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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CURTIS E. MILLER,

Plaintiff and Appellant,

v.

E. CASTILLO et al.,

Defendants and Respondents.

D053483

(Super. Ct. No. ECU3876)

APPEAL from a judgment of the Superior Court of Imperial County, Jeffrey Bruce Jones, Judge. Affirmed.

Curtis E. Miller appeals from a judgment entered after the trial court sustained the demurrer of correctional officers S. Ritter, and J. McBroom to Miller's complaint alleging conversion. Miller contends: (1) the trial court erred in finding that under California Code of Regulation, title 15, section 3006, the respondents were permitted to confiscate his television set; (2) the California Department of Corrections and Rehabilitation Operations Manual section 54030.10.11 was an underground regulation and therefore

was an improper basis for the respondents' confiscation of his television; and (3) respondents were not entitled to immunity under Government Code section 820.2. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND¹

Miller, a prisoner at Calipatria State Prison, filed a lawsuit alleging that respondents intentionally caused him damage by confiscating his television set because it did not work. Miller claimed that after the respondents searched his cell, he advised them that "the power button on his [television] was worn from usage but that when depressed in a particular manner would turn the [television] on." The respondents disposed of the television set because Miller did not have funds to mail it to someone.

The respondents demurred, arguing they confiscated the television in accord with California Code of Regulations, title 15, sections 3006, and 3191, subdivision (c)² and

¹ We grant the respondents' unopposed motion to augment the record on appeal.

² California Code of Regulations, title 15, section 3006 states, "Inmates may possess only the personal property, materials, supplies, items, commodities and substances, up to the maximum amount, received or obtained from authorized sources, as permitted in these regulations." Section 3000 defines contraband as "anything which is not permitted, in excess of the maximum quantity permitted, or received or obtained from an unauthorized source." Section 3006, subdivision (c) 16 restricts "[m]aterial that is reasonably deemed to be a threat to legitimate penalological interests." Section 3006, subdivision (d) states, "Anything in the possession of an inmate which is not contraband but will, if retained in possession of the inmate, present a serious threat to facility security or the safety of inmates and staff, shall be controlled by staff to the degree necessary to eliminate the threat."

California Department of Corrections and Rehabilitation Operations Manual, specifically section 54030.10.11.³ Respondents argued, "Here, [Miller] admits in his pleadings his television set was no longer functioning as designed. The television could not be turned on by prison officials in the normal manner, but could only be turned on (or tested for proper functioning) by some type of secret method known only to [him]. . . . Given that it was contraband, [his] only choice was to dispose of the television himself, or to let the institution dispose of [it]. Because [he] did not have sufficient funds to dispose of [it] himself, [it] was properly disposed of by the institution." Respondents alternatively argued they were immune from prosecution under Government Code section 820.2.

California Code of Regulations, title 15, section 3191, states, "(b) . . . In all instances of confiscation, every reasonable effort will be made to determine the rightful owner of the property. The property will be returned to its rightful owner unless, as the result of disciplinary action for misuse of property, the inmate's approval to possess the property is rescinded. [(¶)] (c) Inmate personal property not meeting the criteria in section 3190, shall be disposed of in accordance with this section. An inmate shall select one of the methods listed in sections 3191(c)(1) through 3191(c)(5) below for disposing of non-allowable personal property which is unauthorized pursuant to subsection (b) and section 3190. If the inmate makes no selection or has insufficient funds, staff shall document that fact and determine the method of disposition. Property that is considered contraband pursuant to section 3006(a) or (c) shall be retained by staff as may be required by ongoing investigation or court order. Following the completion of all disciplinary, investigative, or court requirements, the contraband property shall be disposed of according to institutional/facility procedures."

³ California Department of Corrections and Rehabilitation Operations Manual section 54030.10.11 states, "anything . . . no longer functioning as designed . . . is contraband. Possession of contraband may result in disciplinary action and confiscation of the contraband."

Relying on both grounds, the trial court sustained the demurrer without leave to amend. Miller filed a motion to reconsider. The trial court denied it as untimely and because it did not present new or different facts, circumstances or law.

DISCUSSION

The review of a demurrer and the interpretation and application of a statutory provision to facts assumed to be true present questions of law subject to independent review on appeal. (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1231 [demurrer tests only the sufficiency of the pleadings, which is a question of law]; *Twedt v. Franklin* (2003) 109 Cal.App.4th 413, 417 [statutory interpretation and application are questions of law subject to independent review by this court]. " '[W]e give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained . . . without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.' " (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) The judgment must be affirmed if any one of the several grounds of demurrer is well taken. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

"Conversion is generally described as the wrongful exercise of dominion over the personal property of another. [Citation.] The basic elements of the tort are (1) the plaintiff's ownership or right to possession of personal property; (2) the defendant's disposition of the property in a manner that is inconsistent with the plaintiff's property

rights; and (3) resulting damages." (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 119.)

Miller contends the trial court erred in sustaining the demurrer because his television worked and therefore was not contraband. Miller concedes the power button on the television set was worn. Accordingly, the power button had to be depressed in a particular way that he — but not the respondents — was able to do.

The trial court did not err in sustaining the demurrer. As a matter of law, the first two elements of conversion were not met. First, Miller's right to possess the television depended on his compliance with prison regulations. To implement the prison regulations and identify contraband, the correctional officers had to be able to operate Miller's television. When they could not do so, they concluded the television was unworkable and therefore contraband under California Code of Regulations, title 15, section 3006. The respondents also could reasonably conclude under California Code of Regulations, title 15, section 3006, subdivision (d) that even if the television set was not contraband, "if retained in possession of the inmate, [it] present[ed] a serious threat to facility security or the safety of inmates and staff," and therefore could "be controlled by staff to the degree necessary to eliminate the threat." The respondents point out that a television set that the prison authorities cannot operate is a threat because it "could be taken apart and used as a weapon or to hide contraband such as drugs or weapons. Leaving such items in cells would expose correctional officers to liability for failing to protect inmates and staff." The second element of conversion is not met because, once the respondents determined the television was contraband, he lost his right to possess it.

Respondents lawfully confiscated it and disposed of it as permitted by California Code of Regulations, title 15, section 3191.

Miller contends that the Department of Corrections and Rehabilitation Operations Manual section 54030.10.11, on which the respondents relied, is an "underground rule" that did not comply with the Administrative Procedure Act (Government Code sections 11370 through 11529). As discussed above, however, respondents' demurrer also relied on the television being contraband, under California Code of Regulations, title 15, section 3000 and 3006. The trial court properly sustained the demurrer on that basis.

Accordingly, this contention need not be addressed.

Miller objects to the trial court's decision to sustain the demurrer on the alternative basis that the respondents were entitled to immunity under Government Code section 820.2. Under the Torts Claim Act, "in general, an immunity provision need not even be considered until it is determined that a cause of action would otherwise lie against the public employee or entity." (*Caldwell v. Montoya* (1995) 10 Cal.4th 972, 985.) In light of our conclusion that, as a matter of law, the respondents did not engage in conversion, there was no need for their actions to be immunized. Accordingly, we need not address this contention.

DISPOSITION

The judgment is affirmed. Each party is to bear its own costs on appeal.

O'ROURKE, J.

WE CONCUR:

NARES, Acting P. J.

IRION, J.